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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 600

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
FRANK HEFFRON
MELVYN ZARR
Suite 2030
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
PETER A. HALL
1630 Fourth Avenue North
Birmingham, Alabama

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

Attorneys for Petitioner

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No. .....

ROBERT SWAIN,

Petitioner,

—v.—

ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on June 25, 1965.

Opinions Below

The order of the Supreme Court of Alabama denying petition for leave to file petition for writ of error *coram nobis* is unreported and is set forth in the appendix, *infra*, p. 1a. No opinion accompained that order. The opinion of the Supreme Court of Alabama affirmed by this Court March 8, 1965, 380 U. S. 202, rehearing denied 381 U. S. 921, is reported at 275 Ala. 508, 156 So. 2d 368 (1963).

Jurisdiction

The judgment of the Supreme Court of Alabama was entered June 25, 1965. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3), petitioner

having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented

1. Whether petitioner was denied Fourteenth Amendment rights when tried and convicted by a jury chosen by systematic and arbitrary exclusion of Negroes from jury service as a result of an unvarying practice of the state's attorney who for 12 years always struck Negroes from the petit jury or sought agreements with defense counsel to strike all Negroes at the outset of the jury selection procedure.

2. Whether petitioner, a Negro sentenced to death for the rape of a white woman, was denied rights guaranteed by the Fourteenth Amendment when he has shown that 11 times as many Negroes as whites have been executed for rape in Alabama, a proportion at great variance with the number of Negroes in the state's population, or who committed the crime of rape, and offers to show the grossly disproportionate number of Negro executions can be explained only by race.

3. Does Alabama's grant to juries of unfettered discretion to impose capital punishment for all offenses of rape irrespective of the existence of aggravating circumstances, permit cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

4. Whether petitioner was denied rights guaranteed by the Fourteenth Amendment when the circuit solicitor commented on petitioner's failure to take the stand in his

own defense contrary to this Court's decision in *Griffin* v. *California*, 380 U. S. 609.

5. Whether petitioner was convicted in violation of his Fourteenth Amendment rights when the State of Alabama by statute makes women totally ineligible for jury service.

Constitutional and Statutory Provisions Involved

This case involves the Eighth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statutes of the State of Alabama:

Ala. Code Ann., Title 14, §395

> *Punishment of Rape.* Any person who is guilty of the crime of rape shall, on conviction, be punished, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years.

Ala. Code Ann., Title 30, §21

> *Qualifications of Persons on Jury Roll.* The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being affiicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and

has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.

Ala. Code Ann., Title 15, §305

The Defendant in Criminal Cases a Competent Witness for Himself. On the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness; and his failure to make such a request shall not create any presumption againt him, nor be the subject of comment by counsel. If the solicitor or other prosecuting attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within thirty days from entry of the judgment.

Statement

The petitioner was indicted for rape by the Grand Jury of Talladega County, Alabama and convicted in the Circuit Court of the County, May 25, 1962. The jury fixed his punishment at death by electrocution. On appeal, the judgment was affirmed by the Supreme Court of Alabama, *Swain* v. *State,* 275 Ala. 508, 156 So. 2d 368 (1963). Subsequently, on writ of certiorari, this Court affirmed the judgment of the Supreme Court of Alabama finding petitioner had failed to prove (1) exclusion of Negroes from county grand and petit jury venires and (2) exclusion of Negroes from jury venires by the state's misuse of peremptory strikes in violation of the Fourteenth

Amendment, 380 U. S. 202, rehearing denied 381 U. S. 921 (1965).

On June 25, 1965, petitioner filed in the Supreme Court of Alabama petition for leave to file petition for writ of error *coram nobis* in the circuit court of Talladega County (hereafter referred to as *coram nobis* petition) and petition for stay of execution. Argument was heard immediately following filing by the full court, and on the same day both petitions were denied. The *coram nobis* petition and the order of the Supreme Court appear in the appendix, *infra,* pp. 1a-25a. On July 2, 1965, Mr. Justice Black granted a stay of execution pending the disposition of this petition.

The verified *coram nobis* petition alleges that petitioner has been tried, convicted and sentenced in violation of the Constitution of the United States on a number of grounds set forth in the petition, with supporting affidavits.[1] A summary of these allegations follows.

Exclusion of Negroes from Jury Panels

Petitioner contends that he was deprived of due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment by reason of systematic and arbitrary exclusion of Negroes from service on petit juries in the Circuit Court of Talladega County, as a result of a consistent and unvarying practice of the circuit solicitor who during a period of 12 years (1) always struck Negroes from petit jury venires or (2) sought or

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[1] The *coram nobis* petition prayed that the Supreme Court of Alabama grant an evidentiary hearing on those issues as to which attached affidavits did not suffice (17a).

entered into agreements with defense counsel to strike all Negroes at the outset of the jury selection procedure.

No Negro has served on a petit jury in the County between 1950 and the date of petitioner's trial in 1962 in either a civil or criminal case and petitioner offered to prove "that the Circuit Solicitor of Talladega County was responsible for the total absence of Negroes . . . in that he consistently struck all Negroes remaining on the venire if he was unable to obtain the agreement of defense counsel to the elimination of Negro veniremen" (6a). It was alleged that this Court "indicated in its opinion in this case [380 U. S. 202] that such a practice, if proved, would constitute a violation of the Fourteenth Amendment" and that the issue "had not been adequately heard" (6a).

Petitioner also alleged that he was "unable to present proof of misuse of peremptory strikes by affidavit because the individual best able to execute such an affidavit would be the Circuit Solicitor who represented the State of Alabama at petitioner's trial and who is adverse to the interest of petitioner. The peremptory strike issue, therefore, can only be decided after a full hearing with compulsory process, examination and cross-examination of witnesses" (6a).

The Solicitor's Remarks To The Jury

Petitioner contends that he was deprived due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment because the circuit solicitor (1) unfairly commented on his failure to take the stand in his own defense and (2) aroused racial prejudice and inflamed the minds of the jury (3a). It was alleged that the transcript of petitioner's trial revealed the circuit

solicitor made the following comments during his argument before the jury (7a, 8a):[2]

> Gentlemen do you think we have proved these elements? *I submit to you it is not denied, there is not a word come from this stand that denied the charge of rape.* We have proved it to you, gentlemen, beyond a reasonable doubt that this prosecuting witness was raped. Now the only question that the defendant has raised here by his attorneys is the question of identify (sic). (Emphasis added.) (Transcript p. 354.)

The solicitor further remarked:

> Do you think this young lady, Jimmie Sue Butterworth, consented to have this defendant have the rough and rugged intercourse where this impact against her body caused loose hairs to come out of his privates? You gentlemen know the way a colored person—you have seen them you have seen their hair. You know, gentlemen, it is coarse. You know that it is rough. You know from your own experiences with everyday life that when any two forces meet each other and that there is a rubbing or banging there are going to be hairs lost. Most of you men are married men. You have had everyday experiences. You know from your own knowledge that people shed hairs and they lose them, but gentlemen how many of you if they took us out and shook our clothes would find negroid hairs falling from our privates? (Transcript p. 354.)

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[2] The transcript of petitioner's trial is part of the certified record of petitioner's original appeal on file with the Court.

The Application of the Death Sentence For Rape In Alabama

The Alabama Code, Tit. 14 §395, punishes rape, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years. Petitioner was sentenced to death upon conviction of raping a white woman.

The petition alleged that the State arbitrarily and discriminatorily imposes the sentence of death upon Negroes charged with rape, but does not impose the same penalty upon white men charged with rape under the same circumstances in violation of the Fourteenth Amendment and that §395 violates the Fourteenth Amendment because it affords the jury unlimited, unrestricted and unreviewable discretion in choice of sentence and does not establish any procedure to permit separate consideration of guilt and sentence (4a).

The population of Alabama between 1930 and the present according to the U. S. Census, has been 35.7% nonwhite in 1930, 34.7% in 1940, 32.1% in 1950, and 30.1% in 1960. Between January 1, 1930 and December 31, 1964, the State of Alabama executed 134 persons, of whom 107 or 79% were Negroes and 27 or 20.2% were white. Between January 1, 1930 and December 31, 1964 the State of Alabama executed 22 persons for the crime of rape. Twenty or 90.9% of these were Negroes while 2 or 9.1% were white (11a).

Records on file in the Supreme Court of Alabama show, to the extent that they reveal information concerning the victims' race, that in every case involving the execution of a Negro or white man for the crime of rape, the victim has been a white woman.[3] Eleven of these case records contain explicit statements that the victim was white. In

[3] Allegations were supported by case citations, docket numbers, dates of decision as well as affidavits of attorneys who had examined the records of the cases cited (20a-24a).

five other cases involving the execution of Negroes, a reasonable inference may be drawn that the victim was white. Five other cases resulting in the execution of Negroes do not disclose the race of the victim. There is information in the records on file of the only two cases resulting in execution of white persons from which the inference may reasonably be drawn that the victim was white (11a-13a).

As of March 17, 1965, eighteen persons were committed to Kilby Prison in Alabama awaiting execution, of whom eleven were Negroes. Both of the men under sentence for rape were Negroes convicted of raping white women (13a-14a). At the time the petition was filed the only other cases of defendants known to be presently under sentence of death for rape were three Negro men separately tried and convicted for rape of a white woman in Etowah County, Alabama (13a).

The gross disparity shown between the proportion of Negroes in the population and the proportion of Negroes sentenced to death and executed for the crime of rape is the result of a racially discriminatory system of justice and is not explainable by other factors reasonably related to a rational system of imposing sentence. Negroes have been sentenced to death for a crime which, if committed by persons of the white race, would not have resulted in imposition of the death penalty (14a).

Petitioner offered to prove that race is the sole explanation for this disproportion by reference to judicial records and testimony of attorneys in rape cases in all counties of Alabama, or a representative sample of Alabama counties. He sought "a full hearing with opportunity to prove his allegations with the benefit of compulsory process of witnesses, production of records, examination and cross-examination of witnesses," and alleged that "proper development

of this fundamental issue of constitutional law requires an evidentiary hearing with the full opportunity for full and effective preparation" (14a).

Cruel and Unusual Punishment

Petitioner alleged that he was deprived of Eighth and Fourteenth Amendments rights in that (1) he was sentenced to death for the crime of rape without consideration of aggravating or mitigating circumstances; and (2) on its face and as applied Ala. Code Ann. Title 14, §395 prescribes cruel and unusual punishment for the reason that it provides for a jury verdict which simultaneously determines guilt and fixes sentence at death without permitting separate consideration of guilt and sentence (4a-5a).[4]

Capital punishment is retained for the crime of rape in only 17 states and 4 countries. Petitioner alleged that imposition of such a penalty for rape violates evolving standards of decency which are almost universally accepted. The taking of human life to protect a value other than human life is inconsistent with the constitutional prescription against punishments which are greatly disproportionate to the offense charged. Permissible aims of punishment, such as deterrence, isolation, and rehabilitation can be achieved as effectively by punishing rape less severely than by death and this penalty constitutes unnecesary cruelty (15a-16a).

Exclusion of Women From Jury Service

Petitioner was indicted, tried and convicted by a jury selected pursuant to Ala. Code Ann. Tit. 30 §21 which provides that women are ineligible for service on grand and

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[4] In addition, petitioner alleged that he was deprived of the opportunity to present evidence in mitigation without taking the stand in his own defense and forfeiting the privilege against self incrimination (15a).

petit juries in violation of his rights under the Fourteenth Amendment (5a, 6a, 17a).

How the Federal Questions Were Raised and Decided Below

Before his trial in the Circuit Court of Talladega County, petitioner made motions raising the issue of racial discrimination in violation of his Fourteenth Amendment rights in the selection of persons for the jury roll, the grand jury venire, the grand jury, the petit jury venire and the petit jury as sworn. These motions were denied by the trial court and denial was affirmed by the Supreme Court of Alabama, 275 Ala. 508, 156 So. 2d 368 (1963). On certiorari, this Court affirmed, 380 U. S. 202, rehearing denied, 381 U. S. 921 (1965), on the ground that petitioner had failed to prove racial discrimination in the selection of the venires or of trial jury panels in violation of the Fourteenth Amendment, but indicated additional evidence might show systematic misuse of peremptory strikes in violation of the Constitution.

In affirming petitioner's conviction, the Supreme Court of Alabama also found (156 So. 2d at 378) that the circuit solicitor had not violated Alabama law and commented on the failure of petitioner to testify when during summation to the jury he stated:

> Gentlemen, do you think we have proved these three elements? I submit to you that it is not denied the charge of rape. We have proved it for you, gentlemen, beyond a reasonable doubt that this prosecution witness was raped. Now the only question that the defendant has raised here by his attorneys is the question of identify (sic).

Subsequent to this Court's affirmance of the judgment of the Supreme Court of Alabama petitioner filed in that court a petition for leave to file petition for writ of error *coram nobis* in the Circuit Court of Talladega County following recognized post-conviction procedure under Alabama law. After oral argument, the petition was denied without opinion by the Supreme Court of Alabama, June 25, 1965 (1a).

The *coram nobis* petition alleged deprivation of petitioner's rights under the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution by reason of:

(a) systematic and arbitrary exclusion of Negroes from jury service as a result of a systematic practice of the circuit solicitor, who always struck Negroes from the petit jury venire or sought or entered into agreements with defense counsel so that all Negroes would be struck;

(b) argument of the circuit solicitor before the jury which unfairly commented on petitioner's failure to take the stand in his own defense;

(c) argument of the circuit solicitor before the jury which aroused racial prejudice and inflamed the minds of the jurors;

(d) arbitrary and discriminatory imposition of the penalty of death against Negroes charged with the crime of rape against white women and not imposing the same penalty against white men charged with rape in similar circumstances;

(e) determination of sentence by a jury which had unlimited, undirected and unreviewable discretion in choice of sentence;

(f) a jury verdict which simultaneously determined petitioner's guilt and fixed his sentence at death and did not permit separate consideration of the issues of guilt and sentence;

(g) sentence of death for the crime of rape without consideration of aggravating or mitigating circumstances pursuant to Title 14, §395, Ala. Code Ann., which statute on its face and as applied prescribes the imposition of cruel and unusual punishment;

(h) total exclusion of women from the jury which tried, convicted and sentenced petitioner.

In support of these allegations, petitioner set forth facts appearing on the record of his trial, and the records and files of the Supreme Court of Alabama and reports of agencies of the United States. Attached to the petitions were affidavits which attested to the accuracy of those allegations founded on public records and government reports. Certain of the allegations raised questions of fact as to which petitioner requested an evidentiary hearing and the opportunity to present proof.

Reasons for Granting the Writ

I.

Petitioner Adequately Alleged In His Petition For Writ Of Error *Coram Nobis* Below That His Conviction Deprived Him Of Due Process Of Law And Equal Protection Of The Laws As Guaranteed By The Fourteenth Amendment To The Constitution Of The United States Because The Prosecutor Systematically Struck Negroes From Petit Jury Venires.

In its earlier opinion in this case, the Court implied[5] that persistent use by a prosecutor of peremptory challenges to totally exclude Negroes from petit juries would constitute a violation of the Fourteenth Amendent, saying (380 U. S. 223-24):

> [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicious and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption pro-

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[5] Petitioner was not alone in reading this implication. See Mr. Justice Harlan's concurrence (380 U. S. at 228).

> tecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Petitioner asks the Court to now make explicit what it suggested earlier. Faced with this Court's holding that the record before it was insufficient to support petitioner's constitutional claims, petitioner attempted below to document the prosecutor's abuse of the peremptory challenge system.[6] The court below refused to permit such a showing, necessarily holding that petitioner's allegations in his *coram nobis* petition did not state a federal claim.[7] Petitioner contends the contrary.

The petition alleged (3a, 6a):

> Petitioner, who is a Negro, was deprived of due process of law and equal protection of the laws as

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[6] Petitioner averred that he was unable to offer conclusive evidence in affidavit form, since only through a full evidentiary hearing, featuring the testimony of the circuit solicitor, could he prove his federal claim (6a).

[7] Writ of error *coram nobis* is available in Alabama as a post-conviction remedy for the hearing and determination of claimed denials of federal constitutional rights. *Ex parte Hamilton,* 271 Ala. 88, 122 So. 2d 602 (1960), rev'd, 368 U. S. 52, *coram nobis* petition granted, *Hamilton* v. *State,* 273 Ala. 504, 142 So. 2d 868 (1962); *Brown* v. *State,* 277 Ala. 353, 170 So. 2d 504 (1965). Where conviction has been appealed to the Supreme Court of Alabama and affirmed, a petition for writ of error *coram nobis* may not be filed in the trial court without leave granted by the Supreme Court of Alabama. See, e.g., *Ex parte Williams,* 268 Ala. 535, 108 So. 2d 454 (1959), cert. den. 359 U. S. 1004. Thus, Swain petitioned the Alabama Supreme Court for leave to file a *coram nobis* petition in the trial court.

> guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of systematic and arbitrary exclusion of Negroes from service on petit juries in the Circuit Court of Talladega County, as the result of a consistent and unvarying practice of the Circuit Solicitor, who during a period of twelve years always struck Negroes from the petit jury venire and sought or entered into agreements with defense counsel so that all Negroes would be struck at the outset of the jury selection procedure.
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> No Negro served on a petit jury in Talladega County between 1950 and the date of petitioner's trial in 1962 in either a civil or criminal case. Petitioner offers to prove that the Circuit Solicitor of Talladega County was responsible for the total absence of Negroes on petit juries in criminal cases in that he consistently struck all Negroes remaining on the venire if he was unable to obtain the agreement of defense counsel to the elimination of Negro venireman.

Surely these allegations were sufficient to support proof of the kind required by this Court, viz., proof to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time" (380 U. S. at 227). This proof, erroneously disallowed below, would document a violation of the Fourteenth Amendment.

In an unbroken line of cases since 1880, this Court has consistently held that a state cannot systematically exclude persons from juries because of their race. *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; *Gibson* v. *Mississippi*, 162 U. S. 565; *Carter* v. *Texas*, 177 U. S. 442; *Rogers* v. *Alabama*, 192 U. S. 226; *Martin* v. *Texas*, 200

U. S. 316; *Norris* v. *Alabama*, 294 U. S. 587; *Hale* v. *Kentucky*, 303 U. S. 613; *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; *Akins* v. *Texas*, 347 U. S. 475; *Reece* v. *Georgia*, 350 U. S. 85; *Eubanks* v. *Louisiana*, 356 U. S. 584 and *Arnold* v. *North Carolina*, 376 U. S. 773. Whether by statute or by administrative action, overtly or covertly, the unlawful discrimination has been flushed out and condemned. "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand" *Smith* v. *Texas*, 311 U. S. 128, 132. Abuse of the peremptory challenge system presents systematic exclusion of Negroes from juries in a somewhat altered form; nevertheless, the discrimination is substantial and poses the same danger to "basic concepts of a democratic society and a representative government." *Smith* v. *Texas*, 311 U. S. 128, 130. The decisions of this Court do not say that Negroes may be systematically excluded by state action from jury service as long as they are *called* for jury service. The constitutional duty of state officers is clear and unequivocal: "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, 316 U. S. 400, 404; see also *Hamilton* v. *Alabama*, 376 U. S. 650; *Napue* v. *Illinois*, 360 U. S. 204; *Anderson* v. *Martin*, 375 U. S. 399. The equal protection clause demands no less than recognition that Negroes may not be systematically excluded by the state from jury service *simpliciter*. *Carter* v. *Texas*, 177 U. S. 442, 447; *Norris* v. *Alabama*, 294 U. S. 587, 589; *Patton* v. *Mississippi*, 332 U. S. 463, 466; *Hernandez* v. *Texas*, 347 U. S. 475, 479; and *Eubanks* v. *Louisiana*, 356 U. S. 584, 585, 587.

To permit the insulation of abuses of peremptory challenges from judicial scrutiny would be an exaltation of

form over substance so mischievous as to seriously weaken the administration of justice in this country; it would encourage state officials to accomplish by indirection what they have been carefully taught by this Court over the last 85 years is forbidden by the equal protection clause of the Fourteenth Amendment.

By denying the *coram nobis* petition, the Supreme Court of Alabama failed to understand this Court's opinion in *Swain* v. *Alabama, supra,* which expressly provides for petitioner to seek relief if he proves *systematic* Negro exclusion by means of the prosecutor's peremptory strikes. If the Alabama Supreme Court misreads this Court's opinion in *Swain, supra,* there is every reason to expect that a United States District Court on habeas corpus may do likewise. Thus, this Court should grant *certiorari* to free the matter from doubt rather than remitting petitioner to an uncertain and probably futile habeas forum.

II.

Petitioner Was Denied Rights Under The Constitution When (A) Denied The Opportunity To Offer Proof Of Racial Application Of The Death Penalty In Alabama And (B) The Jury Which Convicted And Sentenced Him Had Unfettered Discretion To Impose Capital Punishment For All Offenses Of Rape—In The Absence of Aggravating Circumstances, Permitting Cruel And Unusual Punishment.

A. Petitioner's Equal Protection Contention Which The Court Below Wrongly Refused To Permit Him To Establish Presents An Important Question For Consideration By This Court On Certiorari.

Seventeen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with extreme violence and great bodily injury to the victim;[8] the remaining sixteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[9] The federal jurisdiction and the District of

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[8] Nev. Rev. Stat. §200.360 (1963). See also §200.400 (aggravated assault with intent to rape).

[9] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 432153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code, art. 27, §§461, 462 (1957); see also art. 27, §12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N. C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann., tit. 21, §§1111, 1114, 1115 (1958); S. C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as

Columbia, with its own strong southern traditions, also allow the death penalty for rape.[10]

Between 1930 and 1962, the year in which petitioner was sentenced to die, 446 person were executed for rape in the United States. Of these, 399 were Negroes, 45 were whites, and 2 were Indians. All were executed in Southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape; a ratio of better than one to eleven. Clearly, unless the incidence of rape by Negroes is many times that of rape by whites, capital punishment for rape

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well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3705 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[10] 18 U. S. C. §2031 (1964); 10 U. S. C. §920 (1964); D. C. Code Ann. §22-2801 (1961).

survives in the twentieth century principally as an instrument of racial repression.[11]

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[11] The figures in this paragraph are taken from United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 32; *Executions*, 1962 (April 1963). Table 1 thereof shows the following executions under civil authority in the United States between 1930 and 1962:

MURDER

	Total	White	Negro	Other
Number	3298	1640	1619	39
Per cent	100.0	49.7	49.1	1.2

RAPE

	Total	White	Negro	Other
Number	446	45	399	2
Per Cent	100.0	10.1	89.5	.04

OTHER OFFENSES

	Total	White	Negro	Other
Number	68	37	31	0
Per Cent	100.0	54.4	45.6	0.0

Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

	White	Negro	Other
Federal	2	0	0
Alabama	2	20	0
Arkansas	1	17	0
Delaware	1	3	0
District of Columbia	0	2	0
Florida	1	35	0
Georgia	3	58	0
Kentucky	1	9	0
Louisiana	0	17	0
Maryland	6	18	0
Mississippi	0	21	0
Missouri	1	7	0
North Carolina	4	41	2
Oklahoma	0	4	0
South Carolina	5	37	0
Tennessee	5	22	0
Texas	13	66	0
Virginia	0	21	0
West Virginia	0	1	0
	45	399	2

If this be so—if the racially unequal results in these States derive from any cause which takes account of race as a factor in meting out punishment—a Negro punished by death is denied, in the most radical sense, the equal protection of the laws.[12] One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The first Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color , . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See e.g., tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 Calif. L. Rev. 171 (1951); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144, implemented the Amendment by reenacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discrimina-

[12] The contention that racially discriminatory application of the death penalty in rape cases denies equal protection has been raised in a number of cases now pending in state and federal courts, including this Court. See, e.g., *Maxwell* v. *Stephens*, —— F. 2d —— (8th Cir., decided June 30, 1965), petition for Writ of Certiorari pending No. 429, October Term, 1965; *Mitchell* v. *Stephens*, 232 F. Supp. 497, 507 (E. D. Ark. 1964), appeal pending; *Moorer* v. *MacDougall*, U. S. Dist. Ct., E. D. S. C., No. AC-1583, petition for writ of habeas corpus pending; *Aaron* v. *Holman*, U. S. Dist. Ct., M. D. Ala., C. A. No. 2170-N, proceedings on petition for writ of habeas corpus stayed pending exhaustion of state remedies July 2, 1965; *Alabama* v. *Billingsley*, Cr. Ct. Etowah County, No. 1159, motion for new trial and motion for reduction of sentence pending; *Craig* v. *Florida*, Sup. Ct. Fla., No. 34,101, appeal from denial of motion for reduction of sentence pending; *Louisiana ex rel. Scott* v. *Hanchey*, 20th Jud. Dist. Ct., Parish of West Feliciana, petition for habeas corpus pending.

tory sentencing survives today as Rev. Stat. §1977 (1875), 42 U. S. C. § 1981 (1964).

For purposes of the prohibition, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . ., except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be punishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. E.g., *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951) (alternative ground); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Hamilton* v. *Alabama,* 376 U. S. 650 (1964) (per curiam).[13] And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other, rather than by a single state official. However, it may divide responsibility internally, the *State* is federally obligated to assure the equal application of its laws.[14] This Court has long sustained claims of discriminatory

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[13] It is also immaterial whether a State imposes different penalties for classes of cases defined in terms of race, or whether it imposes a penalty of death in all cases of a given crime, subject to the option of the jury in some racially defined sub-class of the cases. The Fourteenth Amendment's obligation of equality extends not only to those "rights" which a State is federally compelled to give its citizens, but also to any benefits the State may choose to give any class of them, however gratuitously. *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Watson* v. *City of Memphis,* 373 U. S. 526 (1963); *McLaughlin* v. *Florida,* 379 U. S. 184.

[14] Execution by the State of the death sentence which it has given juries discretion to impose clearly provides that "interplay of governmental and private action," *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 463 (1958), quoted in *Anderson* v. *Martin,* 375 U. S. 399, 403 (1964), which makes the State responsible for the discrimination. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

jury exclusion upon a showing of exclusion continuing during an extended period of years, without inquiry whether the same jury commissioners served throughout the period. See e.g., *Neal* v. *Delaware,* 103 U. S. 370 (1881); *Bush* v. *Kentucky,* 107 U. S. 110 (1882); *Hernandez* v. *Texas,* 347 U. S. 475 (1954). Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense,"[15] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.[16]

Because Alabama has foreclosed petitioner's opportunity to establish racially discriminatory application of the death penalty by denial of his *coram nobis* petition, the only question is whether his allegations are reasonable and sufficient if true to state a constitutional violation. *Pennsylvania ex rel. Herman* v. *Clandy,* 350 U. S. 116; *Coleman* v. *Alabama,* 377 U. S. 129, 133; *Taylor* v. *Alabama,* 335 U. S. 252.

Examination of petitioner's *coram nobis* petition reveals distinct, precise and positive allegations which place beyond question petitioner's reliance on a substantial claim under the equal protection clause. Petitioner is a Negro:

> Who is charged with the rape of a white woman and sentenced to death for that crime in the State

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[15] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act).

[16] See the text of the act *supra;* see also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1/29/1866), 1759 (4/4/1866) (remarks of Senator Trumbull).

> of Alabama which State, its subdivisions, instrumentalities, officers and agents, through policy, practice, custom and usage, arbitrarily and discriminatorily imposes the death penalty against Negroes charged with the crime of rape against white women but does not impose this same penalty against white men charged with the crime of rape in similar circumstances (4a).

United States Census statistics show that Alabama's population from 1930 to the present consisted of a non-white population ranging from 30.1% to 35.7%. Between 1930 and 1964 the State executed 134 persons of whom 107 or 79.8% were Negroes and 27 or 20.2% were white. As of March 17, 1965, 18 persons were committed to Kilby Prison awaiting execution of whom 11 were Negroes and seven were white. During this 24 year period, 1930-1964, the State executed 22 persons for the crime of rape of whom 20 or 90.9% were Negroes and two or 9.1% were white. Two persons presently committed to Kilby Prison awaiting execution for the crime of rape are both Negroes.

To the extent records on file in the Supreme Court of Alabama, involving execution for rape indicate the race of the victim they show that for the crime of rape, the victim of the crime was a white woman in every case.[17]

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[17] Eleven of the cases reveal the race of the victim expressly. In five other cases in which Negroes were executed for the crime of rape, information in the record leads to a fair inference that the victim was white. In five of the cases resulting in the execution of Negroes for the crime of rape, the transcript of trial does not disclose the race of the victim. In the only two cases resulting in the execution of white persons for the crime of rape, there is information in the record on file in the Supreme Court of Alabama from which the inference may be fairly drawn that the victim of the crime was white. The docket numbers, dates of decision or citation of these cases are set forth in the petition. The two men presently awaiting execution in Kilby Prison both have been convicted of the rape of a white woman. One is petitioner in this case, and the other is

The petition expressly alleges that "the gross disparity shown above between the proportion of Negroes in the population and the proportion of Negroes sentenced to death and executed for the crime of rape is the result of a racially discriminatory system of justice and is not explainable of other factors reasonably related to the rational system of imposing sentence" and that "Negroes have been sentenced to death for crimes which if committed by persons of the white race would not have resulted in imposition of the death penalty" (14a). Petitioner offered to prove that race is the sole explanation for the grossly disproportionate number of Negro executions for rape by reference to judicial records and the testimony of attorneys in rape cases in all counties of Alabama or a representative sample of Alabama counties (14a), and sought a "hearing with opportunity to prove his allegations with the benefit of compulsory process of witnesses, production of records, examination and cross-examination of witnesses" (14a).

Petitioner should be accorded an opportunity to establish these substantial allegations. Several considerations support the holding.

First, the hypothesis of racial discrimination is particularly likely in view of the coincidence between the Alabama figures and those of the other jurisdictions—all southern—which have executed persons for rape dur-

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Drewey Aaron, Jr., a Negro also convicted of the rape of a white woman. See *Aaron* v. *State of Alabama*, 273 Ala. 337, 139 So. 2d 309, 1961. In the only other case known to the petitioner of defendants presently under sentence of death for the crime of rape in Alabama, three men were separately tried, convicted and sentenced to death for the crime of rape against a white woman in Etowah County. Motions for new trial and for reduction of sentence are pending in the cases of *Alabama* v. *Billingsley, Jr.*, Cir. Ct., No. 743; *Alabama* v. *Butler*, Cir. Ct., No. 744; *Alabama* v. *Liddell*, Cir. Ct., No. 745.

ing the past thirty years. For all jurisdictions, the Negro-white ratio is nine to one—although for other crimes than rape it is about one to one. Studies and observations by students of the criminal process tend to support the hypothesis of discrimination. E.g. Bullock, Significance of the Racial Factor in the Length of Prison Sentences, 52 J. Crim. L., Crim. & Pol. Sci. 411 (1961); Wolfgang, Kelly & Nolde, Comparison of the Executed and the Commuted Among Admissions to Death Row, 53 J. Crim. L., Crim. & Pol. Sci. 301 (1962); Hartung, Trends in the Use of Capital Punishment, 284 Annals 8, 14-17 (1952); Weihofen, The Urge to Punish 164-165 (1956).

Second, Alabama Law has long accorded differential treatment in sexual matters on the basis of race. The Alabama Constitution prohibits the legislature from permitting interracial marriages. Ala. Const. § 102. Marriage, adultery and fornication between Negroes and whites are felonies and an officer issuing a license for an interracial marriage commits a misdemeanor. Ala. Code Ann. Tit. 14, § 360-61. In addition, Alabama public policy still supports segregation of the races and the statute books of the state still carry provisions which enforce segregation. See Ala. Code Ann. Tit. 48, §§ 186, 196, 464 (intrastate buses); Tit. 46, § 189 (hospitals); Tit. 45, § 248 (schools for the mentally deficient); Tit. 51, § 244 (poll books must indicate race). See also *Lee* v. *Macon County Board of Education,* 231 F. Supp. 743 (M. D. Ala. 1964); *Carr* v. *Montgomery County Board of Education,* 232 F. Supp. 715 (M. D. Ala. 1964).

Third, the absolute discretion which Alabama law gives jurors to decide between life and death, undirected by any rational standards for making that decision, see part II(B), *infra,* invites the influence of arbitrary and discriminatory considerations. This Court has long been con-

cerned with a vagueness of criminal statutes which "licenses the jury to create its own standard in each case." [18] *Herndon* v. *Lowry,* 301 U. S. 242, 263 (1937), See, e.g., *Smith* v. *Cahoon,* 283 U. S. 553 (1931); *Cline* v. *Frink Dairy Co.,* 274 U. S. 445 (1927); *Connally* v. *General Construction Co.,* 269 U. S. 385 (1926); *Winters* v. *New York,* 333 U. S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury caprice and suasion by impermissible considerations, *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 432-433 (1963); *Freedman* v. *Maryland,* 380 U. S. 51, 56 (1965); Lewis, the Sit-In Cases: Great Expectations, [1963] Supreme Court Review 101, 110; Note 109 U. Pa. L. Rev. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States,* 380 U. S. 145 (1965); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Cox* v. *Louisiana,* 379 U. S. 536 (1965). Unlimited sentencing discretion in a capital jury presents this vice in the extreme. To paraphrase *Burstyn* v. *Wilson,* 343 U. S. 495, 505 (1952): "Under such a standard the most careful and tolerant [lay juror] . . . would find it virtually impossible to avoid favoring one [race] . . . over another."

Petitioner requests the Court to grant certiorari, that it may review and reverse the judgment of the Supreme Court of Alabama which denies petitioner's right to demon-

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[18] The petition alleges deprivation of petitioner's rights in that (a) his sentence to death was determined by a jury which had unlimited, undirected and unreviewable discretion in choice of sentence to impose any penalty between a term of 10 years to death, (b) no rational, fair, or uniform standards were set by the statute and the trial judge gave the jury no directions as to choosing among allowable sentences permitting the jury to consider discriminatory racial factors and (c) that the jury's verdict simultaneously determined his guilt and fixed the sentence at death depriving petitioner of the opportunity to present evidence in mitigation without taking the stand in his own defense and forfeiting the privilege of himself against self incrimination (4a-15a).

strate that he had been denied equal treatment in the most grievous penalty known to law. He seeks only a fair opportunity to demonstrate that his present incarceration under sentence of death is the product of a long continued and continuing system of discriminatory administration of justice operating in every gap of discretion left by the state's written law to deny him equal treatment and subject him to extreme punishment which in practice is virtually never applied to the white man but is reserved as the ultimate weapon of terror to hold the Negro in his place. Petitioner asks this Court to consider whether he has the right to demonstrate discrimination because of the Fourteenth Amendment's overriding purpose to secure racial equality and because "racial classifications [are] 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny.' . . ." *MacLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964).

B. The Court Should Grant Certiorari To Consider Petitioner's Contention That His Sentence Is Unconstitutional Under The Eighth And Fourteenth Amendments.

Petitioner alleged that he was unconstitutionally sentenced without consideration of aggravating or mitigating circumstances, pursuant to Title 14, §395 of the Alabama Code, which statute on its face and as applied prescribes the imposition of cruel and unusual punishment in violation of the Fourteenth Amendment (4a, 15a). This question, which three Justices of the Court thought deserving of certiorari in *Rudolph* v. *Alabama,* 375 U. S. 889 (1963), has been deemed by both the Fourth and Eighth circuits as one which "must be for the Supreme Court in the first instance." *Maxwell* v. *Stephens,* —— F. 2d —— (8th Cir. decided June 30, 1965) petition for certiorari pending, No. 429, October Term, 1965. The Fourth Circuit has taken the same view. *Ralph* v. *Pepersack,* 335 F. 2d 128, 141

(4th Cir. 1964). Petitioner respectfully requests the judgment of the Court on the issue.

The question posed is not whether on any rational view which one might take of the purpose of criminal punishment, the defendant's conduct as the jury might have found it at its worst could support a death sentence consistent with civilized standards for the administration of criminal law. For here the issue of penalty was submitted to the jury in their unlimited discretion under Alabama procedure. Their attention was directed to none of the purposes of criminal punishment, nor to any aspect or aspects of the defendant's conduct as they related to imposition of sentence.

The charge of the trial judge to the jury which convicted petitioner set forth the elements of the crime of rape and the evidence which must be found to convict but as to sentence merely stated:[19]

> As I have told you, the punishment for the crime of rape is either death or imprisonment in the penitentiary for not less than 10 years. The limit is on the minimum sentence and not on the maximum.

The jury was not invited to consider the extent of physical harm to the prosecutrix, the moral heinousness of the defendants' acts, his susceptibility or lack of susceptibility to reformation, the extent of the detrrent effect of killing the defendant "pour decourager les autres." Cf. Packer, *Making the Punishment Fit the Crime,* 77 Harv. L. Rev. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: at a whim, a vague

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[19] See p. 361 certified record on file with the Court in *Swain* v. *Alabama,* 380 U. S. 202.

caprice, or because of the color of petitioner's skin if that did not please them. In making the determination to impose the death sentence, they acted wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). A judgment so unconfined, so essentially erratic, is *per se* cruel and unusual because it is purposeless, lacking in any relationship by which its fitness to the offense, or to the offender or to any legitimate social purpose may be tested. It is cruel not only because it is extreme but because it is wanton; and unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary. To concede the complexity and interrelation of sentencing goals, see *Packer, supra,* is no reason to sustain a statute which ignores them all. It is futile to put forward justifications for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied both is "'disproportioned to the offenses charged'" and constitutes "'unnecessary cruelty.'" *Rudolph* v. *Alabama, supra,* 375 U. S. at 891.[20]

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[20] The United States Department of Justice has taken the following position on continued imposition of the death penalty: "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." Letter of Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, reported in *New York Times,* July 24, 1965, p. 1, col. 5.

III.

Petitioner Was Denied Rights Under The Fifth And Fourteenth Amendments When The Circuit Solicitor Was Permitted To Comment On His Failure To Take The Stand.

The constitutional privilege against self-incrimination, which is available in state as well as federal proceedings, *Malloy* v. *Hogan*, 378 U. S. 1, includes the right of a criminal defendant to be free from "comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin* v. *California*, 380 U. S. 609. In *Griffin*, the Court held that the standards imposed upon federal courts and prosecutors by 18 U. S. C. §3841, prohibiting such comment, reflect "the spirit of the Self-Incrimination Clause." 380 U. S. at 613-614. In *Wilson* v. *United States*, 149 U. S. 60, 65 the leading case under §3841, the Court stated: "Comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it." Further, "Counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant for his failure to testify." 149 U. S. at 67.

During his summation to the jury, the circuit solicitor stated:

> Gentlemen, do you think we have proved these three elements? I submit to you it is not denied, there is not a word come from this stand that denied the charge of rape. Now the only question that the defendant has raised here by his attorneys is the question of identify [sic]. (Tr. 354; App. p. 7a.)[21]

[21] Objection to these remarks was made by defendant's counsel and overruled. An exception was reserved (Tr. 355).

This was unfair comment on petitioner's exercise of his constitutional right to remain silent and rely on the presumption of innocence. The Supreme Court of Alabama, affirming the conviction, held that the solicitor's remarks did not violate Alabama's statute forbidding comment, Ala. Code, Tit. 15, §305, because they merely stated that the evidence was uncontradicted or undenied. *Swain* v. *Alabama,* 275 Ala. 508, 156 So. 2d 368, 378 (1963).[22] However, the solicitor did not merely state that evidence was uncontradicted; he said that no word of denial had come from the stand, in obvious reference to the defendant.

The comment alone is enough to invalidate petitioner's conviction under *Griffin* v. *California,* but it need not be considered alone. Not content with allusion to petitioner's failure to testify, the solicitor proceeded to attack him as a bootlegger without any justification in the record[23] and to arouse racial antagonism before the all-white jury. His earthy description of the crime, with its patent racial overtones,[24] not only raises a question of elemental fair-

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[22] Affirmance by the Supreme Court of Alabama preceded this Court's decision in *Malloy* v. *Hogan* and *Griffin* v. *California.*

[23] "Mr. Hollingsworth: Think what it has done to that child's life. When will she ever forget the day of February 7, 1962, when a bootlegger was riding the road and decides he wants to stop and rape somebody in that community right near the county line.

Mr. Hall: If your Honor please, we object to the use of the term 'bootlegger'. We don't recall any testimony, any evidence coming from this witness stand that this man was a bootlegger.

The Court: I'll sustain the objection and I'll instruct the jury not to consider it.

Mr. Hall: We move for a mistrial, your Honor.

The Court: I'll overrule the motion for a mistrial.

Mr. Hall: We take exception.

Mr. Hollingsworth: The way I understand it, he said he was going to get a load from Opelika" (Tr. 354).

[24] "Do you think this young lady, Jimmie Sue Butterworth, consented to have this defendant have that rough and rugged intercourse where this impact against her body caused loose hairs to come out of his privates? You gentlemen know the way a colored person—you have seen them, you

ness of the trial, see, *Viereck* v. *United States,* 318 U. S. 236; *Ross* v. *United States,* 180 F. 2d 160 (6th Cir. 1950), but shows that the solicitor's remarks constituted "hostile comment" on petitioner's failure to testify. See *Wilson* v. *United States,* 149 U. S. at 65.

IV.

Petitioner Was Deprived Of Due Process Of Law And Equal Protection Of The Laws In Violation Of The Fourteenth Amendment Because Women Were Systematically Excluded From The Juries Which Indicted And Tried Him.

The grand jury which indicted petitioner and the trial jury which convicted and sentenced him were chosen pursuant to Ala. Code Ann., Tit. 30, §21 which confines jury service to males over twenty-one years of age. By excluding the female population of Talladega County from any participation in the jury system, Alabama has discriminated on the basis of sex in violation of petitioner's Fourteenth Amendment right to an impartial jury selected from a cross-section of the community.

In *Hoyt* v. *Florida,* 368 U. S. 57, the Court affirmed the conviction of a woman for second degree murder in the face of her claim that Florida excluded women from jury service in violation of the Fourteenth Amendment. The Court found that Florida had not arbitrarily undertaken

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have seen their hair. You know, gentlemen, it is coarse. You know that it is rough. You know from your own experience with everyday life that when any two forces meet each other and that there is a rubbing or banging there there are going to be hairs lost. Most of you men are married men. You have had everyday experiences. You know from your own knowledge that people shed hairs and they lose them, but gentlemen how many of you if they took us out and shook our clothes would find negroid hairs falling from our privates?" (Tr. 355-56).

to exclude women from jury service because the state granted women an automatic exemption, subject to service on a voluntary basis. The Chief Justice, Mr. Justice Black and Mr. Justice Douglas concurred upon finding a "good faith effort to have women perform jury duty without discrimination on the basis of sex." *Id.* at 69. The Court expressly reserved decision of whether a state may confine jury duty to males consistent with the Fourteenth Amendment. *Id.* at p. 60. Cf. *Strauder* v. *West Virginia,* 101 U. S. 303, 310.

Alabama is one of three states which exclude women from jury service by statute.[25] In the remaining states women either serve on the same basis as men or are granted an exemption based on their sex; of these, two states, other than Florida, grant an exemption which is automatic, unless a woman volunteers for service. *Hoyt, Id.* at p. 62. The Court in *Hoyt* recognized that the "Fourteenth Amendment reaches not only exclusion of a class from jury service based on race, but also any other exclusions which 'single out' any class of persons 'for different treatment not based on some reasonable classification', *Hernandez* v. *Texas,* 347 U. S. 475, 478." *Id.* at p. 60.

The question before the Court is, therefore, whether total exclusion of women from jury service is an arbitrary exclusion not based on a reasonable classification. In considering this question, it is at first apparent that dictum in *Strauder* v. *West Virgina,* 101 U. S. 303, 310, to the effect that a state may constitutionally confine jury duty to males is scant authority for exclusion of women at the present time. In the 80 years since *Strauder,* the status of women and the character of female participation in society has been drastically altered. To name two obvious examples, the right to vote and to obtain employ-

[25] See Miss. Code Ann. 1942 (Recompiled Vol. 1958), §1762; South Carolina Code 1952, §§38-52.

ment no longer may be abridged on the basis of sex. U. S. Const. Amend. XIX(1920); 42 U. S. C. §2000(e)(2).

There is no apparent reason why women are any less qualified to render service as jurors than men. Perhaps the only justification for their exclusion, one may suggest, is that women are more likely to have family responsibilities which make jury serivce a hardship; but granting the premise, the conclusion that women may be declared ineligible for jury service as is the case in Alabama, Mississippi, and South Carolina does not follow. The registration procedure approved in *Hoyt* v. *Florida, supra,* as well as the practice of granting an absolute exemption to women which is now employed by 17 states present an appropriate manner in which the states' interest in mitigating hardships flowing from jury service may be met.

Petitioner, a male, has standing to challenge the total exclusion of women from jury service in Alabama. First, he is entitled to a jury impartially drawn from a cross-section of the community. See *Smith* v. *Texas,* 311 U. S. 128. A jury system which excludes women certainly does not represent the attitudes and points of view of the community as a whole. See *Allen* v. *State,* 137 S. E. 2d 711, 110 Ga. App. 56 (1964) (white may complain of Negro exclusion from jury). As the Court said in *Ballard* v. *United States,* 329 U. S. 187, 193-94:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make

> the jury less respesentative of the community than would be true if an economic or racial group were excluded.

Secondly, petitioner was charged and convicted of the crime of rape. Females certainly possess attitudes with respect to such a crime not possessed by men. The addition of their point of view makes the jury system as a whole more suitable to impartial evaluation of the evidence against petitioner than a jury chosen from males exclusively. This is not to suggest that the scope of the right to an impartially selected jury entitles one accused of crime to a jury tailored to the circumstances of the particular case. Petitioner does not here ask for a jury favorable to him, but contends that a jury chosen by excluding women injures him by excluding a distinct class in the community, one which has a perspective more likely to, if included, help produce a jury system which renders impartial and unbiased verdicts and sentences.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
FRANK HEFFRON
MELVYN ZARR
Suite 2030
10 Columbus Circle
New York, New York 10019

ORZELL BILLINGSLEY, JR.
PETER A. HALL
1630 Fourth Avenue North
Birmingham, Alabama

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

Attorneys for Petitioner

APPENDIX

APPENDIX

Judgment of the Supreme Court of Alabama

June 25, 1965

THE SUPREME COURT OF ALABAMA

JUDICIAL DEPARTMENT

OCTOBER TERM, 1964-65

7th Div. 699

Ex parte:

ROBERT SWAIN,

Petitioner.

PETITION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA and PETITION FOR STAY OF EXECUTION

(Re: Robert Swain v. State)

The Petitions having been considered by the entire Court, after argument of counsel,

IT IS ORDERED that they are each hereby denied.

I, Richard W. Neal, Deputy Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instruments herewith set out as same appears of record in said Court.

Witness my hand this 25 day of June, 1965.

/s/ RICHARD W. NEAL
RICHARD W. NEAL
Deputy Clerk,
Supreme Court of Alabama

Coram Nobis Petition

IN THE SUPREME COURT OF ALABAMA

EX PARTE ROBERT SWAIN

PETITION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS IN THE CIRCUIT COURT OF TALLADEGA COUNTY

Now comes Robert Swain, by his attorneys, and respectfully petitions for leave to file a petition for writ of error coram nobis in the Circuit Court of Talladega County, and in support of said petition, petitioner alleges as follows:

1. Petitioner was indicted and convicted for rape in the Circuit Court of Talladega County, Alabama. He was sentenced to death on June 12, 1962. Motion for new trial was overruled and appeal was taken to this Court, which affirmed the judgment of the Circuit Court on September 5, 1963, *Robert Swain* v. *State of Alabama,* Special Term 1963, 7 Div. 581, 275 Ala. 508, 156 So. 2d 368. On September 26, 1963, this Court overruled petitioner's application for rehearing. The United States Supreme Court granted a petition for writ of certiorari on April 27, 1964, *Swain* v. *Alabama,* 377 U.S. 915, and the judgment of this Court was affirmed by the United States Supreme Court on March 8, 1965, 85 S. Ct. 824, 13 L. ed. 2d 759. On May 24, 1965, this Court ordered that the sentence of death be carried out on July 9, 1965.

2. The judgment and proceedings in the Circuit Court of Talladega County and on appeal to this Court appear

of record in the files and minutes of this Court, and reference thereto is hereby made, and the same are asked to be treated as a part of this petition as if fully set out herein.

3. Petitioner respectfully shows that the judgment of this Court and of the Circuit Court of Talladega County were unlawfully and improperly taken against him in that:

(a) Petitioner, who is a Negro, was deprived of due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of systematic and arbitrary exclusion of Negroes from service on petit juries in the Circuit Court of Talladega County, as the result of a consistent and unvarying practice of the Circuit Solicitor, who during a period of twelve years always struck Negroes from the petit jury venire and sought or entered into agreements with defense counsel so that all Negroes would be struck at the outset of the jury selection procedure.

(b) Petitioner was deprived of due process of law and the equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in that the Circuit Solicitor, during his argument before the jury, unfairly commented on petitioner's failure to take the stand in his own defense.

(c) Petitioner was deprived of due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that the Solicitor, during his summation argument before the jury, aroused racial prejudice and inflamed the minds of the jurors.

(d) Petitioner was deprived of due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that petitioner is a Negro who was charged with the rape of a white woman and sentenced to death for that crime in the State of Alabama, which State, its subdivisions, instrumentalities, officers, and agents through policy, practice, custom and usage arbitrarily and discriminatorily imposes the penalty of death against Negroes charged with the crime of rape against white women, but does not impose this same penalty against white men charged with the crime of rape in similar circumstances.

(e) Petitioner was deprived of due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that his sentence of death was determined by a jury which pursuant to Title 14, § 395 of the Alabama Code had unlimited, undirected and unreviewable discretion in choice of sentence.

(f) Petitioner was deprived of due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that the jury's verdict simultaneously determined his guilt and fixed the sentence at death, pursuant to Title 14, § 395 of the Alabama Code, which does not establish any procedure allowing separate consideration of the issues of guilt and sentence.

(g) Petitioner was deprived of due process of law and the equal protection of the laws in violation of the Eighth and Fourteenth Amendments to the United States Constitution in that he was sentenced to death for the crime of rape without consideration of aggravating or mitigat-

ing circumstances, pursuant to Title 14, § 395 of the Alabama Code, which statute on its face and as applied prescribes the imposition of cruel and unusual punishment.

(h) Petitioner was deprived of due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that, on the day he was apprehended by law enforcement officials, he was not informed of his right to remain silent and to refuse to give evidence against himself, nor was he informed of his right to confer with counsel, nor was he provided counsel so that he might be informed of his right to remain silent and to refuse to give evidence against himself; but, instead, he was required against his will and without the advice of counsel to remove his clothing and subject himself to the taking of photographs in the nude and to the combing of his pubic hairs by the state toxicologist, and was forced to surrender his clothing to the custody of the state toxicologist, all of which resulted in the introduction and admission of prejudicial and incriminating evidence at his trial.

(i) Petitioner was deprived of due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that he was given no opportunity to prove that he did not voluntarily submit to the surrender of his clothing, the photographing of his nude body and the combing of his pubic hairs, but instead the jury decided the issue of voluntariness simultaneously with its determination of his guilt.

(j) Petitioner was deprived of due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in

that women were excluded from service on the grand and petit juries pursuant to Title 30, § 21 of the Alabama Code, which statute makes women ineligible for jury service.

4. In support of subdivision (a) of paragraph 3, petitioner shows the Court as follows:

No Negro served on a petit jury in Talladega County between 1950 and the date of petitioner's trial in 1962 in either a civil or criminal case. Petitioner offers to prove that the Circuit Solicitor of Talladega County was responsible for the total absence of Negroes on petit juries in criminal cases in that he consistently struck all Negroes remaining on the venire if he was unable to obtain the agreement of defense counsel to the elimination of Negro venireman. The United States Supreme Court indicated in its opinion in this case that such a practice, if proved, would constitute a violation of the Fourteenth Amendment, *Swain* v. *Alabama,* 13 L. ed. 2d 774.

Petitioner is unable to present proof of the above allegation by affidavit at this time. The individual best able to execute an affidavit supporting this allegation is the Circuit Solicitor, Hon. W. E. Hollingsworth, Jr., who represented the State of Alabama at the trial of this case and who is adverse to the interests of petitioner. Moreover, this is the type of issue which can only be decided after a full hearing with compulsory process, examination and cross-examination of witnesses.

The United States Supreme Court held in this case that the issue presented by petitioner's allegations had not been adequately heard, and petitioner respectfully requests a full evidentiary hearing on this issue before this Court or before the Circuit Court of Talladega County.

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5. In support of subdivision (b) of paragraph 4, petitioner shows the Court as follows:

At the trial of this case, during his argument before the jury, the Circuit Solicitor made the following statements:

> Gentlemen, do you think we have proved these tree elements? I submit to you it is not denied, there is not a word come from this stand that denied the charge of rape. We have proved it to you, gentlemen, beyond a reasonable doubt that this prosecuting witness was raped. Now the only question that the defendant has raised here by his attorneys is the question of identify [sic]. (Transcript, p. 354)

This Court held on appeal of this case that such statement did not violate Alabama Code 1940, Tit. 15, § 305, as amended by Act No. 124, app'vd June 23, 1949, Acts 1949, p. 150. *Robert Swain* v. *State of Alabama*, 275 Ala. 508, 156 So. 2d 368, 378. Since this Court's decision, the Supreme Court of the United States has held that the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution is applicable to proceedings in the state courts under the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1, 84 S. Ct. 1489 (1964). Subsequently, the United States Supreme Court held that comment by either judge or prosecuting attorney on the defendant's failure to take the stand in a state court trial violates the Fifth and Fourteenth Amendments to the United States Constitution. *Griffin* v. *California*, —— U.S. —, 85 S. Ct. ——, 14 L. ed. 2d 106 (1965). The issue raised here was not treated as a federal constitutional issue by this Court, nor was this issue raised in or passed upon by the United States Supreme Court in this case.

Petitioner respectfully submits that the recent decisions of the United States Supreme Court require that this Court hear and determine the federal constitutional issue now presented, and petitioner further submits that he is entitled to a new trial.

6. In support of subdivision (c) of paragraph 3, petitioner shows the Court as follows:

At the trial of this case, during his argument before the jury, the Circuit Solicitor made the following statements:

> Do you think this young lady, Jimmie Sue Butterworth, consented to have this defendant have that rough and rugged intercourse where this impact against her body caused loose hairs to come out of his privates? You gentlemen know the way a colored person—you have seen them, you have seen their hair. You know, gentlemen, it is coarse. You know that it is rough. You know from your own experience with everyday life that when any two forces meet each other and that there is a rubbing or banging there there are going to be hairs lost. Most of you men are married men. You have had everyday experiences. You know from your own knowledge that people shed hairs and they lose them, but gentlemen how many of you if they took us out and shook our clothes would find negroid hairs falling from our privates? (Transcript, p. 354)
>
> MR. HOLLINGSWORTH: Think what it has done to that child's life. When will she ever forget the day of February 7, 1962, when a bootlegger was riding the road and decides he wants to stop and rape somebody in that community right near the county line.

MR. HALL: I your Honor please, we object to the use of the term "bootlegger". We don't recall any testimony, any evidence coming from this witness stand that this man was a bootlegger.

THE COURT: I'll sustain the objection and I'll instruct the jury not to consider it.

MR. HALL: We move for a mistrial, your Honor.

THE COURT: I'll overrule the motion for a mistrial.

MR. HALL: We take exception.

MR. HOLLINGSWORTH: The way I understand it, he said he was going to get a load from Opelika. (Transcript, pp. 355, 356)

MR. LOVE: When he left City Motor Company down here, gentlemen, he had something on his mind. I'll tell you what he had on his mind. He had Mrs. Weldon on his mind. He had been passing that house, she stated she had been living there for ten years.

MR. HALL: If your Honor please, we respectfully would like to interrupt Mr. Love at this time and make an objection. There is no evidence in this trial that this defendant had Mrs. Weldon on his mind. There is nothing at all to connect Mrs. Weldon with this case. We would respectfully urge your Honor that this is truly prejudicial to this defendant, incompetent, immaterial, illegal and has no place in this argument.

MR. HOLLINGSWORTH: Your Honor, I would like to state this. The State has a right to argue what has been presented before the Court. And the evidence is disputed in this case that this defendant went to Mrs. Weldon's house first, the testimony has been that she has lived there for ten or more years on that particular road at that particular place, that he parked his car down below her house and that he went to

her house first. And that when he left he didn't go back to his car, he went the other way. This jury has seen Mrs. Weldon and they have the right to take into play their own knowledge and common sense as to what they see and what they have heard in this courtroom. The State has a right to argue the evidence.

MR. HALL: If your Honor please, as we recall the evidence, both ladies testified that whoever came to their door asked for a telephone. The defense thought that was the reason suggested, that was the only reason certainly offered in this court, in the testimony. We think it highly improper to argue to the jury that there was some other reason for going there when there is not one iota of testimony which has been introduced to that effect.

THE COURT: Gentlemen of the jury I will instruct you at this time that it is the law that counsel for either side can argue any reasonable inference to be drawn from the evidence in the case, however, what was evidence in the case or what is a fact in the case, is a matter for you and you alone to decide. I'll overrule your objection.

MR. BILLINGSLEY: Your Honor, we would like to ask for a mistrial and would like the remarks stated by Mr. Love included in the transcript of the record.

THE COURT: I'll overrule the motion for a new trial.

MR. BILLINGSLEY: We take exception. (Transcript, pp. 352, 353)

MR. HOLLINGSWORTH: . . . Think with me, gentlemen as we go through the evidence, some of the State's evidence on identity. First—now you gentlemen observed Mrs. Weldon. To me she was a nice looking, attractive, pleasant, agreeable person. She looked to me like she would be a Christian woman. There is

nothing from this stand to denote to the contrary. The only thing, if I was being critical of her, I would think she was a poor judge of distance. (Transcript, p. 354)

7. In support of subdivision (d) of paragraph 3, petitioner shows to the Court as follows:

(a) According to the United States Census, Alabama's population was as follows between 1930 and the present:

Year	Total Population	White Population	% White	Nonwhite Population	% Nonwhite
1930	2,646,248	1,700,844	64.3	945,404	35.7
1940	2,832,961	1,849,097	65.3	983,864	34.7
1950	3,061,748	2,079,591	67.9	982,152	32.1
1960	3,266,740	2,283,609	69.9	983,131	30.1

(b) Between January 1, 1930 and December 31, 1964, the State of Alabama executed 134 persons, of whom 107 or 79.8 per cent were Negroes and 27 or 20.2 per cent were white persons.

As of March 17, 1965, 18 persons were committed to Kilby Prison awaiting execution by the State of Alabama, of whom 11 were Negroes and 7 were white.

(c) Between January 1, 1930 and December 31, 1964, the State of Alabama executed 22 persons for the crime of rape, of whom 20 or 90.9 per cent were Negroes and 2 or 9.1 per cent were white persons. As of March 17, 1965, 2 persons were committed to Kilby Prison awaiting execution by the State of Alabama for the crime of rape, both of whom were Negroes.

(d) According to the records on file in this Court of those cases resulting in execution of the defendant for the crime of rape in the State of Alabama since 1930, to the extent that they reveal information as to the race of the

victim of the crime, in every case involving the execution of a Negro or a white man for the crime of rape, the victim of the crime was a white woman. In 11 of these cases, the record on file in this court explicitly discloses that the victim of the crime was white. The names, docket numbers and dates of decision by this court of those cases are as follows:

Name	Citation	Date of Decision	Docket No.
Charles Williams v. *State of Alabama*	224 Ala. 6	December 3, 1931	1 Div. 678
Roosevelt Collins v. *State of Alabama*	234 Ala. 197	May 27, 1937	7 Div. 408
Charles White v. *State of Alabama*	237 Ala. 610	April 27, 1939	4 Div. 46
Norman Bell v. *State of Alabama*	238 Ala. 586	December 4, 1939	1 Div. 72
William Clark v. *State of Alabama*	239 Ala. 380	March 4, 1940	8 Div. 946
Henry Daniels, Jr. v. *State of Alabama*	243 Ala. 675	January 21, 1943	1 Div. 162
Curtis Robinson v. *State of Alabama*	243 Ala. 684	January 28, 1943	1 Div. 163
Reuben Myhand v. *State of Alabama*	259 Ala. 415	August 6, 1953	4 Div. 711
Melvin Jackson v. *State of Alabama*	262 Ala. 528	June 21, 1956	4 Div. 817
Jeremiah Reeves v. *State of Alabama*	264 Ala. 476	June 21, 1956	3 Div. 751
Ernest Cornell Walker v. *State of Alabama*	269 Ala. 555	September 17, 1959	6 Div. 381

In five other cases in which Negroes were executed for the crime of rape, there is information in the record from which the inference may fairly be drawn that the victim was white. These cases are as follows:

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Name	Citation	Date of Decision	Docket No.
Jimmie Brown v. *State of Alabama*	236 Ala. 423	October 6, 1938	6 Div. 145
Frank Johnson v. *State of Alabama*	242 Ala. 278	January 14, 1942	6 Div. 873
William N. Snead v. *State of Alabama*	243 Ala. 231	May 14, 1942	6 Div. 866
Johnnie B. Smith v. *State of Alabama*	247 Ala. 354	January 24, 1946	6 Div. 333
Jesse Frank Jackson v. *State of Alabama*	260 Ala. 641	April 22, 1954	3 Div. 667

In five of the cases resulting in the execution of a Negro for the crime of rape in the State of Alabama, the transcript of trial in this Court, if any, does not disclose the race of the victim of the crime. In the only two cases resulting in the execution of white persons for the crime of rape, there is information in the record on file in this Court from which the inference may fairly be drawn that the victim of the crime was white. *Daniel T. Reedy* v. *State of Alabama,* 246 Ala. 363. *Joseph H. Hockenberry* v. *State of Alabama,* 246 Ala. 369, —— So. 2d ——.

The two men presently awaiting execution in Kilby Prison for the crime of rape are Robert Swain and Drewey Aaron, Jr. Robert Swain is the petitioner in this case. He was convicted of the rape of a white woman. Drewey Aaron, a Negro, was also convicted of the rape of a white woman. *Aaron* v. *State of Alabama,* 273 Ala. 337, 139 So. 2d 309 (1961).

In the only other case known to the petitioner of defendants presently under sentence of death for the crime of rape in the State of Alabama, three men were separately tried, convicted and sentenced to death for the crime of rape against a white woman in Etowah County during the past three months. The names of these cases are:

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State of Alabama v. *Wheeler Billingsley, Jr.*, Cir. Ct. No. 743;
State of Alabama v. *Robert Butler*, Cir. Ct. No. 744;
State of Alabama v. *James Liddell*, Cir. Ct. No. 745.

Petitioner alleges that the gross disparity shown above between the proportion of Negroes in the population and the proportion of Negroes sentenced to death and executed for the crime of rape is the result of a racially discriminatory system of justice and is not explainable by other factors reasonably related to a rational system of imposing sentence. Petitioner alleges that Negroes have been sentenced to death for crimes which, if committed by persons of the white race, would not have resulted in imposition of the death penalty.

Petitioner offers to prove that race is the sole explanation for the grossly disproportionate number of Negro executions for rape by reference to judicial records and the testimony of attorneys in rape cases in all counties of Alabama or a representative sample of Alabama counties. Petitioner respectfully requests a full hearing with opportunity to prove his allegations with the benefit of compulsory process of witnesses, production of records, examination and cross-examination of witnesses. Petitioner also respectfully requests the opportunity to take depositions in preparation for such a hearing. Petitioner is hampered by the unavailability of deposition and discovery procedures in criminal cases. Proper development of this fundamental issue of constitutional law requires an evidentiary hearing with the opportunity for full and effective preparation.

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8. In support of subdivision (e) of paragraph 3, petitioner shows the Court as follows:

Title 14, §395 of the Alabama Code gives the trial jury complete discretion to impose any penalty between a term of 10 years and death. No rational, fair or uniform standards are set by statute, and the trial judge gave the jury no directions as to choosing among allowable sentences. Such a system allows juries to consider discriminatory racial factors in the sentencing process, and petitioner alleges that juries in rape cases have imposed harsher sentences upon Negroes than those imposed on white defendants.

9. In support of subdivision (f) of paragraph 3, petitioner shows the Court as follows:

The petit jury determined petitioner's sentence at the same time that it determined his guilt. Petitioner was deprived of the opportunity to present evidence in mitigation without taking the stand in his own defense and forfeiting the privilege against self-incrimination.

10. In support of subdivision (g) of paragraph 3, petitioner shows the Court as follows:

Capital punishment is retained for the crime of rape in only 17 states and four foreign counties. See *Rudolph* v. *Alabama*, 375 U. S. 889 (1963) (dissenting opinion). Imposition of such a penalty for rape violates evolving standards of decency which are almost universally accepted. The taking of human life to protect a value other than human life is inconsistent with the constitutional prescription against punishments which are greatly disproportionate to the offense charged. Permissible aims of pun-

ishment, such as deterrence, isolation, and rehabilitation can be achieved as effectively by punishing rape less severely than by death and this penalty constitutes unnecessary cruelty.

11. In support of subdivision (h) of paragraph 3, petitioner shows the Court as follows:

Petitioner did not submit voluntarily to the surrender of his clothing, the photographing of his nude body, and the combing of his pubic hairs. Petitioner was not adequately informed of his rights and he did not waive his right to counsel and privilege against self-incrimination. Petitioner had little education and was not acquainted with legal procedures. He asked to see his father and was refused.

Irrespective of the issue of voluntariness, petitioner was deprived of his constitutional rights when officers of the state took his clothing, photographed his body and combed his pubic hairs. These actions were taken while petitioner was being unlawfully restrained of his liberty. Petitioner was not lawfully arrested, but was being held for investigation at the time.

12. In support of subdivision (i) of paragraph 3, petitioner shows the Court as follows:

Petitioner was given no opportunity to take the stand and deny that he voluntarily submitted to the taking of his clothing, the photographing of his body, and the combing of his pubic hairs, without surrendering the privilege against self-incrimination. Moreover, the issue of admissibility of the photographs, clothing and hairs was not determined by the court in a separate proceeding and away

from the presence of the jury. See *Jackson* v. *Denno*, 378 U. S. 368 (1964).

13. In support of subdivision (j) of paragraph 3, petitioner shows the Court as follows:

Title 30, §21 of the Alabama Code specifies that only the names of males shall be placed on the jury roll.

14. Petitioner respectfully requests that the Court stay the execution of defendant's death sentence, grant a full evidentiary hearing on those issues as to which the attached affidavits do not suffice, and grant him the right to file a petition in the Circuit Court of Talladega County for a writ of error coram nobis to inquire into the facts alleged herein or grant such additional or alternative relief as the Court may deem appropriate.

/s/ ROBERT SWAIN
ROBERT SWAIN
Petitioner

/s/ ORZELL BILLINGSLEY, JR.
ORZELL BILLINGSLEY, JR.
/s/ PETER A. HALL
PETER A. HALL
1630 Fourth Avenue North
Birmingham, Alabama

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
FRANK H. HEFFRON
10 Columbus Circle
New York, N. Y. 10019

Attorneys for Petitioner

Verification

State of Alabama)
Montgomery County)

Personally appeared before me, the undersigned authority, a notary public for said State and County, Robert Swain, who being by me first duly sworn, deposes and says that he is the petitioner in the foregoing petition, that he has read the said petition and that the facts and things therein alleged are true and correct to the best of his knowledge and information and belief.

/s/ Robert Swain
Robert Swain
Petitioner

Sworn to and subscribed before me this 25th day of June, 1965.

/s/ Orzell Billingsley, Jr.
Orzell Billingsley, Jr.
Notary Public, Montgomery County, Alabama

Certificate

I, the undersigned counsel of record for Robert Swain, hereby certify that I have this day delivered to the Attorney General of Alabama a copy of the foregoing petition.

Dated this 25th day of June, 1965.

/s/ Orzell Billingsley, Jr.
Orzell Billingsley, Jr.
Attorney for Petitioner

Affidavit of Frank H. Heffron

IN THE SUPREME COURT OF ALABAMA

EX PARTE ROBERT SWAIN

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

FRANK H. HEFFRON, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the courts of New York on March 25, 1963.

2. I have inspected the official publications of the United States Department of Justice, Bureau of Prisons, and can state, on the basis of those reports, that between January 1, 1930 and December 31, 1964, the State of Alabama executed 134 persons of whom 107 were Negroes and 27 were white persons; that during the same period of time, the State of Alabama executed 22 persons for the crime of rape of whom 20 were Negroes and 2 were white persons. *National Prisoner Statistics* Bulletin on Executions 1930-1964, No. 37 (April 1965).

3. I have in my possession a certificate executed by Milford S. Dean, Chief Clerk of Records and Identification of the Alabama State Board of Corrections, stating the following information as to the name, race and date of execution of all persons lawfully executed for the crime of rape in the State of Alabama between 1927 and October 18, 1963:

Name	Race	Date of Execution
Cleveland Malone	Negro	February 27, 1931
Mose Daniels	Negro	March 27, 1931
Charley Williams	Negro	January 15, 1932
Roosevelt Collins	Negro	June 11, 1937

Affidavit of Frank H. Heffron

Name	Race	Date of Execution
Curtis Cobb	Negro	August 19, 1938
Jimmie Brown	Negro	November 25, 1938
Roy Anderson	Negro	June 9, 1939
Charles White	Negro	June 9, 1939
Herman Bell	Negro	March 29, 1940
Willie James Brandon	Negro	August 9, 1940
William Clark	Negro	July 17, 1941
William N. Snead	Negro	June 26, 1942
Frank Johnson	Negro	June 4, 1943
Henry Daniels, Jr.	Negro	August 13, 1943
Curtis Robinson	Negro	August 13, 1943
Joseph H. Hockenberry	White	March 16, 1945
Daniel T. Reddy	White	March 16, 1945
Jesse Frank Jackson	Negro	June 4, 1954
Melvin Jackson	Negro	September 28, 1956
Jeremiah Reeves	Negro	March 26, 1958
Ernest Cornell Walker	Negro	December 4, 1959

4. On March 17, 1965, I was present in Kilby Prison and observed the official records of Kilby Prison which showed that as of March 17, 1965, 18 persons were on death row awaiting execution of whom 11 were Negroes and 7 were whites.

5. I am presently associated with counsel of record in the cases of Robert Swain and Drewey Aaron, Jr., and I can state that both are Negroes presently under sentence of death in Kilby Prison as the result of conviction for rape of white women.

6. I am associated with counsel of record in the cases of *State of Alabama* v. *Wheeler Billingsley, Jr.*, Etowah County Circuit Court No. 743, *State of Alabama* v. *Robert Butler*, Etowah County Circuit Court No. 744, and *State*

of Alabama v. *James Biddell,* Etowah County Circuit Court No. 745. In all three of these cases, the defendants are Negroes recently sentenced to dath for the rape of a white woman.

7. In the case of *State of Alabama* v. *Wheeler Billingsley, Jr.,* Etowah County Circuit No. 743, the defendant filed a motion for new trial and a motion for reduction of sentence raising the claim that the death penalty is discriminatorily applied against Negroes in rape cases by the State of Alabama. In preparation for hearing on that motion, defendant issued subpoenas duces tecum to the Circuit Court Clerks of all counties in Alabama requiring their appearance at the hearing with records of rape cases in their courts between 1930 and 1965. On motion to quash the subpoenas, the Circuit Court, on June 2, 1965, quashed all of the subpoenas duces tecum except that issued to the Circuit Clerk of Etowah County. At the same time, the Circuit Court of Etowah County denied defendant permission to take depositions of the Circuit Clerks except those residing more than 100 miles away from Etowah County.

/s/ Frank H. Heffron
Frank H. Heffron

Sworn to before me this 24th day of June, 1965.

/s/ Marjorie H. Doswell
Marjorie H. Doswell
Notary Public, State of New York
No. 31-6082800
Qualified in New York County
Commission Expires March 30, 1966

Affidavit of Fred Wallace

IN THE SUPREME COURT OF ALABAMA

EX PARTE ROBERT SWAIN

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

FRED WALLACE, being first duly sworn, deposes and says:

1. I am a graduate of the Harvard University School of Law and was awarded the degree of Bachelor of Laws in June, 1964.

2. During April, 1963 I inspected the official records of Supreme Court of Alabama on file in the Judicial Building, Montgomery, Alabama, of all cases resulting in execution of the defendant for the crime of rape in Alabama.

3. In the following cases resulting in execution of the Negro defendant for the crime of rape, the record discloses that the victim of the crime was white: *Charles Williams* v. *State,* Transcript, p. 14; *Roosevelt Collins* v. *State,* Transcript, p. 4; *Charles White* v. *State,* Transcript, p. 44; *Norman Bell* v. *State,* Transcript, p. 61; *William Clark* v. *State,* Transcript, p. 24; *Henry Daniels, Jr.* v. *State,* Transcript, p. 29; *Reuben Myhand* v. *State,* Transcript, p. 417; *Melvin Jackson* v. *State,* Opinion of the Court, 88 So. 2d 206; *Jeremiah Reeves* v. *State,* Opinion of the Court, 68 So. 2d 14, 16; *Ernest Cornell Walker* v. *State,* Opinion of the Court, 114 So. 2d 402, 403.

4. In the following cases resulting in the execution of the Negro defendants, the inference may fairly be drawn

from the transcript on file that the victim of the crime was white.

Jimmie Brown v. *State,* Transcript; *Frank Johnson* v. *State,* Transcript, p. 126; *William N. Snead* v. *State,* Transcript, p. 52; *Johnnie B. Smith* v. *State,* Transcript, p. 247; *Jesse Frank Jackson* v. *State,* Transcript, p. 43.

5. In the only two cases resulting in the execution of the white defendant, the inference may fairly be drawn from the transcript on file that the victim of the crime was white: *Daniel T. Reedy* v. *State; Joseph H. Hockenberry* v. *State.*

/s/ FRED WALLACE
FRED WALLACE

Sworn to before me this 24th day of June 1965.

/s/ MARJORIE H. DOSWELL
MARJORIE H. DOSWELL
Notary Public, State of New York
No. 31-6082800
Qualified in New York County
Commission Expires March 30, 1966

Affidavit of Eddie Howard Tucker

IN THE SUPREME COURT OF ALABAMA

EX PARTE ROBERT SWAIN

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

EDDIE HOWARD TUCKER, being duly sworn, deposes and says:

1. I am an attorney at law admitted to the bar of the State of Mississippi, May 3, 1965.

2. On June 23, 1965, I inspected the records of the United States Department of Commerce, Bureau of Census, 350 Fifth Avenue, New York, New York. Upon examination of the official records of the Census Bureau, I state that the population figures set forth in paragraph 7 (a) of the petition for leave to file petition for writ of error coram nobis in the Circuit Court of Talladega County, are true, correct, and accurate.

/s/ EDDIE H. TUCKER
EDDIE H. TUCKER

Sworn to before me this 24th day of June, 1965.

/s/ MARJORIE H. DOSWELL
MARJORIE H. DOSWELL
Notary Public, State of New York
No. 31-6082800
Qualified in New York County
Commission Expires March 30, 1966